Supreme Court of the United States

OCTOBER TERM, 1943.

No. 632.

STATE OF MISSOURI, UPON THE INFORMATION OF ROY McKITTRICK, ATTORNEY GENERAL OF THE STATE OF MISSOURI, AT THE RELATION OF THE CITY OF TRENTON, MISSOURI, A MUNICIPAL CORPORATION,
PETITIONER,
VS.
MISSOURI PUBLIC SERVICE CORPORATION, A DELAWARE CORPORATION,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI AND BRIEF IN SUPPORT THEREOF.

ROY McKITTRICK,
Attorney General,
RUSSELL N. PICKETT,
Trenton, Missouri,
HARRY G. WALTNER, JR.,
Jefferson City, Missouri,
Attorneys for Petitioner.

COVELL R. HEWITT,
Assistant Attorney General,
Jefferson City, Missouri,
PROSS T. CROSS,
GERALD CROSS,
Lathrop, Missouri,
Of Counsel for Petitioner.

INDEX

Petition for Writ of Certiorari

Brief in Support of Petition for Writ of Certiorari

Table of Cases

STATUTES

TEXTS

Supreme Court of the United States

OCTOBER TERM, 1943.

No. .....

STATE OF MISSOURI, UPON THE INFORMATION OF ROY McKITTRICK, ATTORNEY GENERAL OF THE STATE OF MISSOURI, AT THE RELATION OF THE CITY OF TRENTON, MISSOURI, A MUNICIPAL CORPORATION,
PETITIONER,

VS.

MISSOURI PUBLIC SERVICE CORPORATION, A DELAWARE CORPORATION,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI AND BRIEF IN SUPPORT THEREOF.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, the State of Missouri, upon the information of Roy McKittrick, Attorney General of the State of Missouri, at the relation of the City of Trenton,

Missouri, a municipal corporation, respectfully shows as grounds for the issuance of a Writ of Certiorari to the Supreme Court of Missouri:

A.

Summary Statement of the Matter Involved.

This is a proceeding for the ouster of the Respondent from the maintenance and operation of an electric generating and distribution system operated and maintained by Respondent in the City of Trenton, Missouri, and supplying such service to a minor group of citizens of that municipality. This action is one of a number of proceedings which have been instituted in various courts involving directly or indirectly the operation and maintenance of this plant.

This litigation has continued over a period of many years. The Congress of the United States through the enactment of the National Industrial Recovery Act, Title II, determined that it was the policy of our Government to encourage the building and operation of municipal electric plants in those communities without them and in those communities wherein inadequate and unsatisfactory electric service was supplied at unreasonable and exorbitant rates. The City of Trenton, on behalf of its citizens, long suffering from poor and inadequate service and subjected to high and exorbitant rates, promptly proceeded to utilize the opportunities afforded by this legislation to obtain satisfactory and economical electric service by complying with the necessary formalities. Its citizenry voted *ad valorem* tax bonds in the amount of $250,000 so as to obtain the necessary funds for matching a Federal grant of $88,000 for the building of a modern and efficient electric generating plant and distribution system and proceeded with the letting of contracts to that end. After

the contracts had been partially executed, the Respondent in the instant case filed an injunction suit in the United States District Court for the Western District of Missouri, the object of which was to enjoin the City of Trenton from proceeding with the erection and operation of such plant and distribution system. Your petitioner herein, as one of its defenses to such action, alleged the invalidity of the Respondent's purported franchise, referred to as the "Jones Franchise," and contended that the Respondent herein was without right or authority to maintain and operate an electric generating and distribution system in the City of Trenton (R. 89). After a full and complete trial on the merits, the United States District Court entered its judgment and decision sustaining the contentions of the petitioner herein and determining that the Respondent herein had no valid franchise for the operation and maintenance of an electric generating and distributing system in the City of Trenton (R. 131).

The Respondent herein appealed such decision to the United States Circuit Court of Appeals, which Court, after a full consideration of the merits of the case, affirmed the decision of the United States District Court (R. 158). The United States Circuit Court of Appeals in an opinion in which it set forth additional reasons on the basis of which the judgment of the United States District Court was correct, closed its opinion with the following statement (R. 164):

> "We think that the decree appealed from was right for the reasons stated, and it is therefore affirmed."

Considering the purport of the statement and the punctuation used by the Court, it can only fairly be determined

that the decree of the District Court was right for t reasons stated in the decree of the District Court a not alone for the reasons stated by the United Stat Circuit Court of Appeals in its opinion.

Although Respondent herein endeavored to persua the United States Circuit Court of Appeals to modify i opinion on this particular point (R. 167, R. 168), no fu ther appeal or proceedings to review the decision of t United States Circuit Court of Appeals was prosecute by the Respondent, and it thus became a final adjudica tion of these issues.

At the conclusion of that case, demands were mad by the City of Trenton, for the Respondent herein t cease its operations in generating and distributing elec tric energy (R. 5, 6, 34). These demands were ignore by Respondent and Petitioner instituted this original Qu Warranto proceeding in the Supreme Court of Missour the object and purpose of which was to require the Re spondent herein to cease its operations and to remove it equipment and facilities from the public streets and thor oughfares of the City of Trenton (R. 2-10). As is cus tomary in such cases, a Special Commissioner was ap pointed by the Court to hear the evidence in the case and to make findings of fact and conclusions of law re specting the issues involved (R. 43). Hon. Edgar J. Keat ing of the Kansas City, Missouri, Bar was appointed by the Court and served as Commissioner (R. 43).

Hearings were held at Trenton, Warrensburg and Kansas City, Missouri, and in New York City (R. 1052). The relevant facts shown by the evidence taken at these hearings are as follows:

On July 22, 1886, the Town of Trenton, then oper- ating under special charter granted by the Legislature

(R. 508) granted a franchise (referred to herein as the "Jones Franchise") to C. D. Jones and Associates to operate a gas and electric plant "or either of them" in the Town of Trenton (R. 301), providing that such electric or gas plant should be in operation by December 1, 1886 (R. 304). Shortly after the grant of the Jones Franchise, Jones constructed and placed in operation a gas plant. He never at any time constructed or placed in operation an electric plant under the Jones Franchise (R. 285-286, 289, 676). The first electric plant in Trenton was constructed and placed in operation by James P. Anderson, who owned the Trenton-Thompson Houston Electric Company. The Trenton-Thompson Houston Company operated an electric plant as assignee of a franchise (R. 192) granted by the Town of Trenton to W. E. Bailey (referred to herein as the "Bailey Franchise"), which franchise was granted on April 2, 1890 (R. 179). The Bailey Franchise was originally for a term of ten years, but by amendment the franchise was extended to a term of twenty years (R. 197), therefore expiring April 2, 1910. The undisputed evidence was that the Trenton-Thompson Houston Electric Company plant, built and operated under the Bailey Franchise, was the first and only electric plant in the City of Trenton; that the plant was started in 1890 (R. 285-286) and was operated by the Trenton-Thompson Houston Electric Company until 1897 (R. 676). Neither Jones nor the Trenton Gas and Electric Light Company (the company organized by Jones) ever operated an electric plant in Trenton under the Jones Franchise (R. 676). The electric company (operating under the Bailey Franchise) acquired the gas company (operating under the Jones Franchise) in 1897, consolidating for the first time under one management the gas and electric properties in Trenton (R. 666-667). It was not

until after April 2, 1910 (the date of the expiration of the Bailey Franchise) that predecessors of Respondent claimed to be operating an electric plant under the Jones Franchise (R. 470). The Respondent herein is the successor to the interests of the respective owners of both the Bailey and the Jones Franchises.

The evidence before the Commissioner showed that the properties of the Respondent were old and deteriorated to the extent that they created a hazard to the public (R. 207, 208, 1003, 1037-1045) and that the City of Trenton was the owner of a new, modern, efficient and well-equipped electric generating plant and distribution system of sufficient capacity to serve all of the users of electricity in the City of Trenton and suburbs and those who might in the future require such service (R. 205).

The Special Commissioner made his report to the Supreme Court of Missouri (R. 1047-1100, inclusive), finding the issues in favor of the Petitioner and recommending the ouster of Respondent. It should be noted that this conclusion was reached by the Commissioner after extensive hearings and the taking of approximately 1,100 pages of evidence. This report was filed on the 6th day of December, 1940 (R. 1047). Thereafter Respondent herein filed certain exceptions to the Report of the Commissioner (R. 1101), and the case was briefed and argued before the Supreme Court of Missouri, *en banc*.

On the 20th day of July, 1943, the Supreme Court of Missouri handed down its decision, refusing to adopt the report of the Commissioner and endeavoring to justify its failure to follow the judgment and decision of the United States Courts in the prior injunction proceedings, found the issues in favor of the Respondent, denied the ouster thus granting to the Respondent herein a perpetual franchise to maintain and operate an electric gener-

ating and distribution system in the City of Trenton, Missouri (R. ..... to .....).

On the 29th day of July, 1943, Petitioner herein filed its motion for rehearing, setting forth the errors of the Supreme Court of Missouri and pointing out that such judgment and decision violated the rights of Petitioner guaranteed to it under the Federal Constitution (R. .....).

On the 1st day of November, 1943, the Supreme Court of Missouri, without further comment, overruled Petitioner's motion for rehearing (R. .....).

Petitioner herein thereby completely exhausted all remedies available to it, save and except this Writ of Certiorari and has proceeded to file this proceeding with this Court within the three months time limit provided for in pertinent Federal law.

B.

Basis of Jurisdiction.

(1) The judgment of the Supreme Court of Missouri determined adversely to Petitioner the right, title, privilege and immunity especially set up and claimed by the Petitioner under the Constitution of the United States, in that it fails to give full faith and credit to the judgments of the United States District Court, for the Western District of Missouri (19 Fed. Supp. 45), and the United States Circuit Court of Appeals, Eighth Circuit (95 F. 2d 1), in the cases of *Missouri Public Service Corporation* v. *Fairbanks, Morse & Co. and the City of Trenton et al.*, as guaranteed Petitioner by the provisions of Section 1 of Article IV of the Constitution of the United States.

(2) The judgment of the Supreme Court of Missouri determined adversely to Petitioner the right, title,

privilege and immunity especially set up and claimed by Petitioner under the Constitution of the United States, in that it impairs the obligation of contract of Petitioner guaranteed Petitioner by the provisions of Section 10 of Article I of the Constitution of the United States.

(3) The judgment of the Supreme Court of Missouri determined adversely to Petitioner the right, title, privilege and immunity especially set up and claimed by Petitioner under the Constitution of the United States, in that it deprives Petitioner of property without due process of law guaranteed Petitioner by the provisions of the V and XIV Amendments to the Constitution of the United States.

(4) The jurisdiction of this Court is urged under Section 237 of the Judicial Code, as last amended by an Act of January 31, 1928, Chapter 14, Section 1, 45 Stat. 54 (U. S. C. A., Title 28, Sec. 344 and particularly Sec. 344 (b) thereof).

C.

Questions Presented.

Petitioner respectfully urges the following questions for the consideration of this Court:

1. (a) Did not the judgment of the United States District Court, for the Western District of Missouri (19 Fed. Supp. 45), and the judgment of the United States Circuit Court of Appeals, Eighth Circuit (95 F. 2d 1), between the parties hereto, finally and conclusively determine adversely to the Respondent, the validity of the claimed franchise for the establishment, maintenance and operation of an electric generating plant and distribution system?

(b) Was not the Supreme Court of Missouri required to recognize the judgments referred to in Para-

graph 1 (a) hereof as finally and conclusively determining the issue of the validity of the claimed franchise in the instant case, under the full faith and credit clause of the Federal Constitution? (Section 1, Article IV, Constitution of the United States.)

2. (a) Has not the State of Missouri, by the adoption of the common law and by a long line of decisions of the Supreme and Appellate Courts, established the law of Missouri to be that municipal grants of franchises to private parties are to be strictly construed and that doubtful points shall be resolved against the grantee?

(b) Has not this construction become so well established in Missouri law that it becomes a part of every franchise agreement entered into and thus becomes a part of the contract between the Petitioner and the Respondent?

(c) Has not the Supreme Court of Missouri, by its decision in this case, entirely ignoring this established law and the fact that it becomes a part of the franchise agreement impaired the obligation of contract of Petitioner guaranteed Petitioner by Section 10, Article I of the Constitution of the United States?

(d) Has not the Supreme Court of Missouri by its decision in this case, entirely ignoring this established law of Missouri and without over-ruling the prior decisions establishing this principle of law, deprived Petitioner of property without due process of law, in violation of the V and XIV Amendments to the Constitution of the United States?

3. (a) Has not the State of Missouri, by the adoption of the common law and by a long line of decisions of the Supreme and Appellate courts, established the law of Missouri to be that legislative delegations of authority to municipalities are to be strictly construed?

(b) Has not the Supreme Court of Missouri by its decision in this case entirely ignored the established law of Missouri and the fact that it became part of the franchise agreement impaired the obligation of contract of Petitioner guaranteed Petitioner by Section 10, Article I of the Constitution of the United States?

(c) Has not the Supreme Court of Missouri, by its decisions in this case, entirely ignoring the established law of Missouri and without over-ruling the prior decisions establishing this principle of law, deprived Petitioner of its property without due process of law, in violation of the V and XIV Amendments to the Constitution of the United States?

D.

Reasons Relied on for the Allowance of the Writ.

(1) Section 1 of Article IV of the Federal Constitution provides:

> "Full faith and credit shall be given in each State to the * * * judicial proceedings of every other State * * *"

Petitioner contends that the United States District Court for the Western District of Missouri, and the United States Circuit Court, Eighth Circuit, in a proceeding between the same parties to this action, finally and conclusively determined that the franchise claimed by the Respondent herein, for the erection, maintenance and operation of an electric generating and distribution plant, was void and of no effect; that such decision, from which no appeal was taken or Application for Writ of Certiorari was applied for, determined that the franchise claimed by the Respondent was void and of no effect. The Petitioner urges that such final decisions of the United States Courts were decisions which the Supreme Court of Mis-

souri was required, under the aforementioned section of the Federal Constitution, to recognize and to render its decision in the instant case accordingly. The orderly administration of justice requires that when rights are finally and conclusively determined by a United States Court of competent jurisdiction, that such determination be recognized and applied by all other Courts, including the Supreme Court of Missouri, when considering litigation between the parties and in which the same issue is involved.

(2) The State of Missouri adopted the common law as of the year 1607. Section 645, Revised Statutes of Missouri, 1939. It was well established in common law that any grant of the Sovereign of any special right or privilege is to be strictly construed against the grantee and that there are no intendments to be drawn over and above that which are specifically and clearly set forth in the grant. Blackstone, Part II, page 347. This common law principle was adopted and made the law of Missouri. No legislation has been enacted modifying or limiting the common law as applicable to the point at issue here. It was in full force and effect in Missouri at the time the Jones Franchise Ordinance was adopted. This common law principle has been many times recognized and applied by the Appellate Courts of Missouri. The case of *St. Louis Gas Light Company* v. *St. Louis Gas, Fuel and Power Company,* 16 Mo. App. 52, 76, applied this principle and since then many other cases have reiterated its application to franchises. *Carroll* v. *Campbell,* 108 Mo. 550, 559, 17 S. W. 884, 886. The decision in the St. Louis Gas Light Company case was rendered June 17, 1884, two years before the franchise ordinance in the instant case was enacted. The latter case was decided in 1891, several years prior to the purchase of the Jones Franchise by the owners of the Bailey Franchise.

It is recognized principle of law, reaffirmed many times by the Courts of Missouri, that legislative enactments are to be read with and construed as a part of the contracts which they affect.

This rule of law, calling for the strict consideration of franchise agreements is so well established in Missouri that it must be recognized that franchise agreements are entered into in the light of such law. The Supreme Court of Missouri in its decision has entirely ignored this principle of law and, in fact, has most liberally construed the franchise agreement in order to sustain its decision.

In order to clearly present to this Court the basis for the foregoing statement, the following statements are made:

(a) Section (1) of the franchise ordinance (R. 301) grants "the privilege of erecting gas and electric light works or either of them." Section (4) (R. 302-303) provides that the grantee "is hereby authorized to construct and maintain gas and electric light works or either of them * * * and to carry on the business of manufacturing gas and electricity or either of them." The words "or either of them" clearly indicates the grantee had three options under the ordinance; first, the grantee might build an electric light and gas works; second, the grantee might build a gas plant; third, the grantee might build an electric plant. The grantee was clearly privileged under the ordinance to exercise any one of these alternatives. Further, under Section (6) of the ordinance (R. 304) he was to commence the construction on or before August 1, 1886, and complete it on or before December 1, 1886. From the facts in this case, it is clear that the grantee exercised the privilege of erecting the gas plant. No effort was ever made at any time to erect

an electric plant. Grantee's failure to do so on or before the date required, to-wit, December 1, 1886, clearly indicates his exercise of the option provided. A reasonable construction of the franchise, let alone a strict construction of the franchise, requires a holding that alternative rights were granted, the option selected was acted upon by the grantee and by so doing the grantee assumed and exercised all the rights and privileges granted under the franchise and such act completely encompassed the privileges and rights which the City of Trenton claimed. The Supreme Court of Missouri in its decision in this case did not even mention this established principle of law, did not comment upon the adoption by this State of the common law and did not purport to overrule the many cases in Missouri establishing this as the law.

(b) Provisions of the franchise ordinance referred to above specifically requires the grantee to erect an electric light works, in the event the grantee exercised that alternative right provided for in the franchise. The grantee nor his successors have never erected an electric light works under the Jones Franchise. Applying the rule of strict construction to this franchise, it is essential that the grantee or his successors deciding to exercise the privilege of operating an electric generating and distribution system must comply with that provision in the franchise ordinance respecting the building of an electric light works. The operation of an electric generating and distribution system, erected under the authority of the Bailey Franchise, cannot possibly satisfy the requirement in the Jones Franchise for the erection of an electric light works. It should be recalled that at the time of the passage of both the Jones and the Bailey Franchise ordinances, there was no provision for the regulation by a public body of either the service or the rates

of a public utility company. The only safeguard the people had against poor and inadequate service and against exorbitant rates was competition between companies. These franchise ordinances must be construed in the light of conditions existing at that time. Likewise, they must be construed in the light of law, which has always been that a valid franchise can only be granted upon the assumption that it will be used for the public benefit in a reasonable time. *State ex inf.* v. *Light and Development Company of St. Louis*, 246 Mo. 618, 640, 152 S. W. 67, 71; *State ex inf.* v. *Delmar Jockey Club*, 200 Mo. 34, 69, 92 S. W. 185, 98 S. W. 539.

We respectfully urge that the building of the electric light works was a condition precedent to the maintenance and operation of an electric generating and distribution system under the Jones Franchise, and believe that the Court's construction of the franchise ignoring this factor is clear evidence of its disregard of the rule of strict construction of the franchise agreement which became a part of the agreement itself.

(c) In the foregoing point we have shown the total failure to erect electric light works at any time under the Jones Franchise. Another evidence of the Court's failure to apply the rule of strict construction is found in its failure to recognize that Section (6) of the franchise ordinance required the grantee to proceed with the construction of such facilities and equipment as he expected to operate in the City of Trenton on or before a fixed date, to-wit, December 1, 1886. A strict construction of the franchise agreement requires a holding that the failure to construct electric light works on or before this date forfeited any rights or privileges which the grantee had to erect and operate an electric light works.

(d) In a further respect the Supreme Court of Missouri failed to apply a strict construction of the franchise ordinance. Section (7) of the Bailey Franchise (R. 304) clearly contains a self-operating forfeiture provision. This provision has been most liberally construed in favor of the Respondent. It should be remembered that the owners of the Bailey Franchise purchased the gas plant erected and operated under the Jones Franchise in 1897, eleven years after the passage of the Jones Franchise ordinance. It is clear from a record in this case that until the expiration of the Bailey Franchise under which the electric light works were erected, the Respondent's successors made no claim to be operating the electric generating and distribution system under the Jones Franchise. In other words, electric light works were operated under the Bailey Franchise until 1910, twenty-four years after the passage of the Jones Franchise ordinance. This is supported by the fact that the original Bailey Franchise required the grantee to supply electric service to the city free of charge (R. 180, Sec. 5). In 1906, long after the Jones Franchise and the gas plant had been purchased by Respondent's predecessors, the obligation of Respondent's predecessors to supply such free electric current, provided for in the Bailey Franchise was recognized and reaffirmed (R. 465).

Both under the self-operating clause of the franchise ordinance and under the general law, the Bailey Franchise was forfeited. *Los Angeles Railroad Company* v. *City of Los Angeles*, 52 Cal. 242, 92 Pac. 490, 125 Am. St. Rep. 54, 15 L. R. A. (N. S.) 1269. Regardless of the fact that twenty-four years after the franchise agreement, the predecessors of Respondent assumed to operate under the Jones Franchise, the subsequent operation could not have revived the forfeited franchise rights which are claimed by Respondent. The Supreme Court of Missouri, in the

case of *State ex rel. Kansas City* v. *East Fifth Street Railway Company*, 140 Mo. 539, 41 S. W. 955, clearly held that the municipality could not, by a franchise ordinance, contract away the right of the State to forfeit the franchise for non-user. This being the law of Missouri, the actions of the parties, either the grantee or the grantor, could not revive the franchise or prevent the forfeiture from occurring.

Respondent's predecessors clearly planned to revive the franchise, and the Special Commissioner in this case found many evidences of the Respondent's predecessor's plans. For further facts concerning this, we direct the Court's attention to Petitioner's brief filed in support of this petition.

Petitioner in the preceding paragraphs of this subdivision "(2)" has set forth many particulars in which the Supreme Court of Missouri failed and refused to recognize and apply the established law of Missouri, in that franchise agreements are to be strictly construed against the grantee and that whatever is not unequivocally granted is withheld and as that principle, incorporated into the law of Missouri by Section 645, Revised Statutes of Missouri, 1939, became a part of the franchise contract entered into between Petitioner and Respondent and that the decision of the Supreme Court, in failing to recognize this, has impaired the obligation of Petitioner's contract with Respondent.

Petitioner further urges to this Court that the decision of the Supreme Court of Missouri in failing to recognize and apply this well established rule of law has so flagrantly disregarded the established law of Missouri as declared in the statutes and previous decisions of the Courts, so as to constitute a denial to Petitioner of the due process of law guaranteed by the V and XIV Amendments of the Constitution of the United States. As here-

tofore stated the State of Missouri through the enactment of what is now Section 645, Revised Statutes of Missouri, 1939, adopted the common law as of the year 1607. The Supreme Court of Missouri is without power or authority to modify or change this specific legislative enactment. The General Assembly of Missouri is the only authority having the power to change or modify this law and the Supreme Court of Missouri, presuming to exercise this power has deprived your Petitioner of its property without due process of law. It has been held many times that due process of law refers not only to legislative and executive action but to judicial action as well. *Chicago, Burlington and Quincy Railroad Company* v. *City of Chicago*, 166 U. S. 226; 41 L. Ed. 979, 17 Sup. Ct. Rep. 581. The question of due process of law is a consideration of the result attained in its totality and when clearly and patently unfair and injurious, even though there has been compliance with proceedings which should normally result in a fair and just decision, the due process clause will protect against a patently unjust, unfair and inequitable result. *Raymond* v. *Chicago Union Traction Company*, 207 U. S. 20, 52 L. Ed. 78, 28 Sup. Ct. Rep. 7.

As in the *Raymond case, supra*, so is this case a most exceptional one and its decision is of great importance to a large number of people. Petitioner has a right, under the established judicial system and pursuant to our fundamental system of government, to have the decisions of the Courts based upon well recognized and established principles of law. When a Court so clearly and unequivocally disregards those rules and where such disregard is patent on the face of the record and the opinion, the litigant has been denied due process of law guaranteed to him by the Constitution of the United States. There are no rigid rules which can be applied

to the application of this constitutional provision. This Court has very recently pointed out this fact and the ease with which justice might be frustrated by a straight-jacket application of this constitutional provision. *Betts* v. *Brady*, 316 U. S. 455, 462, 86 L. Ed. 1595, 1601, 1602, 62 Sup. Ct. Rep. 1252, 1256.

(3) In order for the Supreme Court of Missouri to find that Respondent possesses a valid franchise for the generating and distributing of electricity in the City of Trenton, it decided that the City of Trenton had authority under its special charter to enter into the franchise agreement. In considering the special charter under which the City of Trenton operated it applied a most liberal construction to the provisions of the special charter. In so doing, it impaired the obligation of Petitioner's contract contrary to Section 10, Article I of the Constitution and it deprived Petitioner of its property without due process of law contrary to the V and XIV Amendments. The charter of any municipality necessarily becomes a part of any franchise or agreement entered into insofar as it is pertinent to the question at hand and all municipal agreements and franchises must be considered in the light of the charter provisions. The charter provides no authority under which Petitioner could, in 1936, have granted an electric franchise. The pertinent charter provisions, as considered by the Supreme Court of Missouri are found on pages 517, 519 and 529 of the record. Section 5, Article III, of the charter authorized the counsel by ordinance to:

> "establish, open, abolish, alter, widen, graduate, pave or otherwise improve all streets, avenues, alleys, sidewalks, public grounds and squares, and to provide for the lighting, cleaning and repairing of same."

Section 13, Article III of the charter provides:

> "Finally to pass all such ordinances as may be expedient in maintaining the peace, good government, health and welfare of the town."

Section 6, Article VII of the charter provides:

> "The council shall have power by ordinance to direct and regulate the working and improving of all streets, avenues, alleys, sewers and drains in said town and provide for the lighting and cleaning of the streets, avenues and alleys."

The Supreme Court of Missouri first relied upon the provisions of Section 6 of Article VII authorizing the council to provide for the lighting of the streets. Even the most liberal construction of this provision could not authorize the granting of an electric franchise under which there was no provision of any kind or character for the lighting of the streets, avenues or alleys with electricity. Section 5 of the Jones Franchise specifically provides for the lighting of the streets by gas (R. 203). This Court has specifically held in construing similar franchise ordinances that a gas franchise and a light franchise are two entirely different things and must be considered separately. *Capital City Light and Fuel Company* v. *City of Tallahassee*, 186 U. S. 401, 46 L. Ed. 1219, 22 Sup. Ct. Rep. 866. Sole authority cited by the Supreme Court is the case of *State ex rel. Underground Service Co.* v. *Murphy*, 134 Mo. 548, 31 S. W. 784. The charter of the City of St. Louis, there considered, granted the city authority to regulate "the public use of the street." This is far broader authority than reposed in the City of Trenton under its special charter. Secondarily, the Supreme Court of Missouri relied upon Section 13, Article III of the special charter (R. 519) authorizing the passage of ordinances for the peace, good government, health and

welfare of the town. An examination into the pertinent acts of the General Assembly clearly shows that this provision was never intended to authorize the granting of electric franchises.

Section 13 of Article III of the special charter is almost identical with the provisions of Section 1526, Revised Statutes of Missouri, 1889, which authorized cities of third class to enact ordinances "as may be expedient for maintaining the peace, good government and welfare of the city and its trade and commerce." At that time, cities of the third class were only authorized to enter into franchises for gas and water. Sections 951 and 952, Revised Statutes of Missouri, 1879. In 1889, these sections were amended by including the word "electricity," thus authorizing such cities to enter into franchises for electric service. By this act of the Legislature amending these sections it is clear that it was never intended that the provisions of Section 1526, Revised Statutes of Missouri, 1889, authorizing the enactment of ordinances for the peace, good government and welfare of the city were sufficient to authorize municipalities to enter into electric franchises. It necessarily follows then that the Legislature did not intend that the provisions of the special charter of the City of Trenton, Section 13, Article III, which is couched in almost identical terms, be construed to authorize the City of Trenton to enter into electric franchises.

(5) Petitioner recognizes that this Court cannot correct mere errors of law committed by the Supreme Court of Missouri, but the reasons here advanced for the issuance of a Writ of Certiorari in this case clearly show that there has been such a departure from all of the established precedent and such an ignoring of pertinent

and well established rules of law which became a part of the franchise agreement entered into and which Petitioner had a right to rely upon in the making of the franchise contract, as to result in the Supreme Court of Missouri decision in this case clearly impairing the obligation of the franchise contract. Petitioner herein is not unmindful of the fact that in a number of other cases involving other circumstances this Court has determined that ordinarily the impairment of contract obligations protected by Article I, Section X of our Constitution, is impairment by legislation and not by judicial interpretation. However, there are exceptions. *Muhlker v. New York & Harlem Railroad Company*, 197 U. S. 544, 49 L. Ed. 872, 25 Sup. Ct. Rep. 522. Petitioner respectfully submits that this is a case so flagrant in its disregard of Petitioner's rights as to call for the protection, aid and assistance of this Court.

The importance of this case far transcends the interest of the parties to this suit. There is a vast number of franchises granted throughout the State of Missouri at a time approximating 1886. A number of actions involving the rights of municipalities to erect electric plants and to oust privately owned utilities have been filed. The decision in the instant case sets the pattern which will be followed. Without question power companies are entitled to a fair consideration concerning their asserted rights. However, the public likewise is entitled to like consideration. In the instant case every question of doubt has been resolved in favor of the power company in direct conflict with the statutes of the State of Missouri, and with the court's decisions under them over a period of decades. Only through the exercise by this court of its discretion in the granting of this writ can the established law of Missouri, and the rights afforded by the

Federal Constitution, be effected and preserved not only for Petitioner, but in respect to many other municipalities of Missouri finding themselves in a situation comparable to Petitioner.

Wherefore, your Petitioner prays that a Writ of Certiorari be issued under seal of this Court directed to the Supreme Court of Missouri, commanding said Court to certify and send to this Court a full and complete transcript of the record and proceedings in the case of State of Missouri upon the Information of Roy McKittrick, Attorney General of the State of Missouri, at the Relation of the City of Trenton, Missouri, a municipal corporation, vs. Missouri Public Service Corporation, a corporation, Number 36189, to the end that this cause may be reviewed and determined by this Court as provided for in the statutes of the United States and that the findings and decision of said Supreme Court of Missouri to which Petitioner has objected be reversed by this Court and for such further relief as to this honorable Court may seem proper.

ROY MCKITTRICK,
Attorney General,
RUSSELL N. PICKETT,
Trenton, Missouri,
HARRY G. WALTNER, JR.,
Jefferson City, Missouri,
Attorneys for Petitioner.

COVELL R. HEWITT,
Assistant Attorney General,
Jefferson City, Missouri,
PROSS T. CROSS,
GERALD CROSS,
Lathrop, Missouri,
Of Counsel for Petitioner.